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December 10, 2010

The Honorable Anthony J. DeLuca
President Pro Tempore
Senate
State of Delaware
411 Legislative Avenue
Dover, DE 19901

     RE: Request for an Attorney General's Opinion

Dear Senator DeLuca,

You have asked whether an exempt, non-merit executive assistant employed by the Delaware State Senate providing computer programming services to the Delaware Department of Labor ("DOL") for a finite period of time violates Delaware law. To answer your question, we have reviewed applicable sections of the Delaware Constitution and statutes. We believe, based on the facts you provided, that the performance of technical computer programming and support services by an executive assistant ("E.A.") of the Senate for another State governmental agency, incidental and supplemental to assigned legislative duties, is not prohibited by Delaware law.

The relevant facts for purposes of legal analysis are as follows. Before accepting a position as an executive assistant with the Senate in 2009, the E.A. served in the DOL, initially as an administrative assistant to the Secretary and later in a merit position in the Office of Labor Law Enforcement ("OLLE"). In the course of employment with the OLLE, the E.A. acquired technical expertise with respect to the OLLE's computer systems and other administrative

operations. You are the Senator assigned as the direct report for the E.A. During the time frame

at issue you served as Administrator of Labor Law enforcement in the DOL and as *President pro*

tempore of the Senate.

Beginning in February, 2010, the E.A. reported to the offices of DOL during the work

week, leaving each Wednesday at approximately 11:00 a.m. to travel to your office in Dover for

the duration of the day to perform Senate business. On Tuesdays, Wednesdays and Thursdays

when the Senate was in session, between March and June 2010, the E.A. left DOL at

approximately 11:00 a.m. for work in Dover at the Senate offices. While at the DOL, the E.A.

provided exclusively administrative services to DOL personnel and the computer programming

consultant, primarily, but not exclusively, to assist DOL with the implementation of a computer

system designed to address enhanced workforce fraud responsibilities imposed by recent

legislative enactments. The E.A. provided no more services to the DOL as of November 2010,

upon completion of the computer system.

The E.A. is an exempt, non-merit employee serving at the pleasure of the Delaware State

Senate. You have advised that the practice of the Senate is that the duties and work locations of

exempt assistants are determined by the Senator to whom each assistant is assigned. During the

time that the E.A. helped to implement and provide technical support services for the DOL

computer system, the E.A. fulfilled the work requirements of the Senate. Although services

provided by the E.A. assisted the DOL, the Senate has not requested payment from DOL for the

services provided. As a matter of practical concern, we recognize the demand to create

efficiencies between state agencies, particularly with respect to sharing technical computer

expertise and especially in light of the present challenging fiscal environment.

The initial question presented is whether an executive assistant of the Senate performing

computer programming services for an executive branch agency violates the constitutional doctrine of separation of powers. Separation of powers is a doctrine that prevents any of the three branches of government from usurping the constitutional authority of a co-equal branch. *See Superior Court v. PERB*, 988 A.2d 429, 433 (Del. 2010). The doctrine applies to the core decision making responsibilities of the legislative, executive and judicial branches and not to the necessary coordination between agencies that is essential to the operation of state government. *See Opinion of the Justices*, 389 A.2d 109, 115 (Del. 1977). Since the E.A. to the Senate performed exclusively administrative functions for the DOL—assisting with the implementation or enhancement of computer systems—we believe that the factual circumstances described in your letter do not implicate the doctrine of separation of powers.

Members of the General Assembly are constitutionally bound to disclose any "personal or private interest in any measure or bill pending" and not to "vote thereon." Del. Const. art, II § 20. The General Assembly has explicated the constitutional requirement in 29 *Del. C.* ch. 10 ("Legislative Conflicts of Interest"), and has provided therein for enforcement by Legislative Ethics Committees of the House and the Senate. 29 *Del. C.* § 1003. While this office has no jurisdiction over matters of ethical conduct of legislators, it seems unlikely that a Senator using a Senate employee to perform work for a state agency implicates either the Constitution or the Legislative Conflicts of Interest statute, which are focused on legislative acts.

Because you are a state employee as well as a member of the General Assembly, the next issue presented is whether the State Employees', Officers' and Officials' Code of Conduct ("Code of Conduct"), 29 *Del. C.* ch. 58, prohibits an employee of the DOL from using an employee of the General Assembly to perform work for the DOL. The Code of Conduct prohibits unethical conduct by state officials and employees. The Code of Conduct's specific

prohibitions are directed toward preventing conflicts of interest that interfere with the performance of public duties. 29 *Del. C.* § 5806(b)-(h). The General Assembly has vested jurisdiction of these matters in the Public Integrity Commission (PIC), which enforces the Code of Conduct. The provision of technical computer programming and support services to the DOL by the E.A. under the circumstances outlined in your letter does not appear to implicate the reporting requirements of the PIC.

Another statutory concern is whether funds appropriated to the Legislature for services were improperly provided to another state agency. Chapter 65 of title 29 of the Delaware Code, which provides the Budget and Fiscal Regulations for State Agencies, prohibits the expenditure of appropriated funds "except for purposes necessary to carry out the functions" of the agency to whom the appropriation is made. 29 *Del. C.* § 6505(c). Additionally, "[n]o money shall be drawn from the Treasury of this State to pay the salaries . . . of employees of this State, or to defray the expenses of any agency . . . or for work or labor performed . . . except upon legitimate, itemized bills, invoices or statements . . . ." 29 *Del. C.* § 6515(a). But, it is arguable that chapter 65 does not apply to the General Assembly; on the one hand, the definition of "agency" is broad and excludes the judiciary, but not the General Assembly, while on the other hand, "agency" commonly refers to the executive branch. However, we do not reach that question because 1) no legislative funds were expended for the DOL, and 2) the E.A. performed the legislative services for which a salary appropriation was made. Moreover, chapter 65 does not prohibit a particular person or class of persons or impose a penalty.

Finally, the facts that you have described involve Senate rules and practices. As you state, the practice of the Senate is that the duties and work locations of exempt assistants are determined by the Senator to whom each assistant is assigned. The E.A. is an exempt, non-
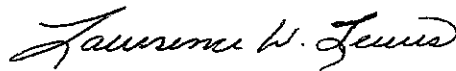
merit employee serving at the pleasure of the Delaware State Senate. During the time that the

E.A. worked on DOL computer systems, the E.A. satisfied the work requirements of the Senate.

However, as a constitutional matter, it is not our role to construe the procedures and practices of

the Senate. *State ex rel. Biggs v. Corley*, 172 A. 415, 421 (Del. 1934).

Respectfully,

Lawrence W. Lewis
State Solicitor